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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1942.

AINTREE CORPORATION,
a Corporation,
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

No. 702

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals
for the Seventh Circuit

and

BRIEF IN SUPPORT THEREOF.

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INDEX.

	Page
Petition for writ of certiorari	1–20
Questions presented	2
Jurisdiction	3
Summary statement of matter involved	4
Reasons relied on for allowance of writ	17
Prayer for writ	19
Supporting brief	21–33
Opinion of the court below	21
Jurisdiction of this Court	22
Date of final judgment below	22
Statement	22
Specifications of error	23
Argument	24
Point I (Assignment of errors 1 and 2)	24
Point II (Assignment of error 3)	25
Point III (Assignment of error 4)	27
Point IV (Assignment of errors 5 and 6)	30
Conclusion	33
Appendix	34

Cases Cited.

American Smelting & Refining Co. v. National Labor Relations Board, 126 F. (2d) 680, 687 33

Consolidated Edison Company of New York, Inc., et al. v. National Labor Relations Board, 305 U. S. 197 .. 4

Cudahy Packing Co. v. National Labor Relations Board, 102 F. (2d) 745, 753 (C. C. A. 8) 18, 27

Hazel-Atlas Glass Company v. National Labor Relations Board, 127 F. (2d) 109, 114, 116 32

National Labor Relations Board v. American Rolling Mills Co., 126 F. (2d) 38, 42 (C. C. A. 6) 18, 26

National Labor Relations Board v. Baldwin Locomotive Works, 128 F. (2d) 39, 51 (C. C. A. 3).....18, 26
National Labor Relations Board v. Columbian Enameling & Stamping Company, Inc., 306 U. S. 292..... 4
National Labor Relations Board v. Express Publishing Co., 312 U. S. 426, 433-437.....4, 18, 28
National Labor Relations Board v. Link-Belt Company, 311 U. S. 584, 599..... 31
National Labor Relations Board v. Luxuray, Inc., 123 F. (2d) 106, 108 (C. C. A. 2).....17, 25
National Labor Relations Board v. Sands Manufacturing Company, 306 U. S. 332..... 4
National Labor Relations Board v. Skinner & Kennedy Stationery Company, 113 F. (2d) 667, 670, 671 (C. C. A. 8) 17, 24
National Labor Relations Board v. Virginia Electric & Power Co., 314 U. S. 469..... 4
National Labor Relations Board v. Waterman Steamship Corporation, 309 U. S. 206, 208-209..... 19
The Associated Press v. National Labor Relations Board, 301 U. S. 103, 132..... 32
Westinghouse Electric & Mfg. Co. v. National Labor Relations Board, 112 F. (2d) 657, 661 (C. C. A. 2), affirmed per Curiam in 312 U. S. 660.....18, 26

Statutes Cited.

Judicial Code, Sec. 240 (a), as amended by Act of Feb. 13, 1925, 43 Stat. 938 [28 U. S. C. A. 347 (a)].. 3
National Labor Relations Act, Sec. 10 (e), 49 Stat. 454 [29 U. S. C. A. 160 (e)]..... 3

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PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Seventh Circuit

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Now comes Aintree Corporation, a corporation, petitioner, and respectfully petitions this Honorable Court to grant a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit, and to remove therefrom to this Court, for review, the record in the case lately pending in said Circuit Court of Appeals styled "National Labor Relations Board, Petitioner, v. Aintree Corporation, Respondent," being Cause No. 8028 on the docket of said Circuit Court of Appeals.

The duly certified record, including all of the proceedings here material, had before National Labor Relations Board where said cause originated, and in the said Circuit Court of Appeals, wherein the Board filed its petition for the enforcement of an order made by it against this petitioner, is filed herewith under separate cover.*

QUESTIONS PRESENTED.

1. (A) Is an employer required under the National Labor Relations Act to "restrain" foremen and foreladies from attending union meetings where such attendance is not found to have been other than of their own volition, and constitutes their sole union activities, and is the employer's failure to so "restrain" them an unfair labor practice?

(B) Does a finding by the Board that such employees "* * * continued unchecked to attend (union) meetings * * *" permit a finding and conclusion that they "continued thereby to throw the (employer's) support to that organization"?

2. May the Board make a blanket injunctive order against an employer which has no anti-union history, its president is found by the Board to have been neutral as to the organizations involved and to have ordered the discharge of supervisors engaging in union interference, and where the only findings of unfair labor practices are that: the employer did not "restrain" supervisory employees from attending union meetings; a supervisory employee, whose employment has been terminated, made anti-union

*The printed record in the Court below consisted of an appendix to the Board's brief which was designated as "Appendix to Petitioner's Brief," and an appendix to the brief of this petitioner (respondent in the Court below), which was designated as "Appendix to Respondent's Brief." The printed record in this Court consists of such appendices and the record of the Appellate proceedings below printed under the supervision of the Clerk of this Court. In this petition and petitioner's supporting brief, the said Appendix to the Board's brief will be referred to as B. A., the said Appendix to this Petitioner's brief as R. A., and the said printed record of Appellate proceedings as A. P.

remarks; another supervisory employee expressed an unfavorable opinion of unions; and one of two employees discharged was a member of an affiliated union and her discharge was due to her union affiliation and was discriminatory?

3. May the Board require an employer to post notices which state that its employees are free to become or remain members of a specifically designated organization and that the employer will not discriminate against any employee because of membership or activity "in that organization," but which fail to state and inform the employees that they are free to join or organize any union they choose without being limited to such designated organization?

4. Are the Board's findings that Petitioner engaged in unfair labor practices supported by substantial evidence?

5. Does the record support the Board's order against this Petitioner?

JURISDICTION.

1. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938 [28 U. S. C. A. 347 (a)], and Section 10 (e) of the National Labor Relations Act, 49 Stat. 454 [29 U. S. C. A. 160 (e)].

2. The opinion of said Circuit Court of Appeals was rendered in said cause on November 12, 1942 (A. P. 321), and on the same day the said Court ordered that the petition of the National Labor Relations Board for Enforcement of the Board's order against this petitioner be granted (A. P. 333). Petitioner's petition for rehearing was duly filed on November 27, 1942 (A. P. 333), and was denied on December 4, 1942 (A. P. 336). On December 4, 1942, the said Circuit Court of Appeals entered its Decree

in said cause (A. P. 336). This petition is here presented on the ..... day of ....., 1943.

3. The following decisions sustain the jurisdiction of this Court to review the said decision and decree of the said Circuit Court of Appeals for the reasons set out herein and in the specifications of error in the supporting brief annexed hereto:

Consolidated Edison Company of New York, Inc., et al. v. National Labor Relations Board, 305 U. S. 197;

National Labor Relations Board v. Columbian Enameling & Stamping Company, Inc., 306 U. S. 292;

National Labor Relations Board v. Sands Manufacturing Company, 306 U. S. 332;

National Labor Relations Board v. Express Publishing Company, 312 U. S. 426;

National Labor Relations Board v. Virginia Electric & Power Co., 314 U. S. 469.

SUMMARY STATEMENT OF MATTER INVOLVED

After complaint, answer, and hearing in a proceeding instituted by the Board upon charges filed by International Ladies' Garment Workers' Union, Local No. 373, affiliated with American Federation of Labor (hereinafter called "International"), the Board found that petitioner had engaged and is engaging in unfair labor practices as defined by Section 8, subsections (1), (2) and (3), of the National Labor Relations Act (B. A. 345-369). The Board ordered that the petitioner cease and desist from such alleged unfair labor practices and from **"in any other manner interfering with, restraining or coercing its employees"** in the exercise of their rights as guaranteed in Section 7 of the Act, and that the petitioner refrain from recognizing The Better Union, and offer reinstatement to employee Mina Hale with compensation for loss of wages

from December 4, 1940 (B. A. 370-371). (Emphasis ours.) The Board further ordered that petitioner post notices stating that it will not engage in the conduct from which it was ordered to cease and desist, that petitioner will take the affirmative action directed in said Order and that petitioner's employees "are free to become or remain members of **International Ladies' Garment Workers' Union, Local No. 373, affiliated with the American Federation of Labor,** and that the (petitioner) will not discriminate against any employee because of membership or activity in **that** organization" (B. A. 371). (Emphasis ours.)

Upon the Board's petition for enforcement (B. A. 1-4),* the Court below, with Circuit Judge Major dissenting (A. P. 327-332), decided (A. P. 321-327) that the Board's petition for enforcement should be granted, and thereafter entered its order (B. A. 333) and its decree for the enforcement of the Board's aforesaid Order (B. A. 336).

In his dissenting opinion Circuit Judge Major held that, "It is such decisions as this which are calculated to bring the National Labor Relations Act into disrepute" (A. P. 332).

From the Board's findings, and the uncontradicted evidence, the following appears:

Petitioner is an Illinois corporation. It has its principal office and a plant at Fairfield, Illinois, and is there engaged in the manufacture of men's underwear (B. A. 345). When requested so to do petitioner has bargained collectively with its employees (R. A. 138).** The Board found that

*To such petition this petitioner duly filed an answer (R. A. 1-10) contending that the Board's findings of unfair labor practices are not supported by substantial evidence and that the Board's Order is not valid or proper under the Act.

**"There is not a scintilla of evidence of any anti-union history—that (petitioner) has ever fostered company unions, broken strikes, been guilty of espionage or of any character of hostility against or favoritism toward any union or member thereof" (dissenting opinion of Circuit Judge Major, A. P. 327). Neither the Board nor the majority opinion of the Court below found otherwise.

petitioner's president was neutral as to the organizations here involved (B. A. 364), and had ordered that any supervisory employee engaging in union interference should be discharged (B. A. 362).

The Better Union is an unaffiliated labor organization which admits to membership all employees of petitioner (B. A. 345). It was organized on December 27, 1940 (B. A. 347), pursuant to a discussion had and action taken by employees at a party given by them at the home of employee Otis Turner on December 19, 1940 (B. A. 175-176, 197, 198; R. A. 39, 40, 46, 52, 53, 106), and with the assistance and counsel of an attorney retained upon their instructions by one of the employees at the party and to whom they had referred the matter of consulting counsel (B. A. 62, 197, 198, 205, 206-209, 210, 213-214, 215, 216, 220-221; R. A. 52-53).

The petitioner has about 250 employees (B. A. 345) and 180 of them are members of The Better Union (R. A. 158-159).† The petitioner consulted the regional office of National Labor Relations Board respecting a request by The Better Union for recognition (B. A. 250-252). On January 13, 1941, The Better Union petitioned the Board that it be certified as the bargaining representative of petitioner's employees (R. A. 100). There is no evidence or claim that petitioner recognized or bargained collectively with The Better Union.

No meetings of The Better Union were held on the petitioner's property (B. A. 76, R. A. 37, 49, 176), or on petitioner's time (R. A. 176). There is no evidence or finding that there was any solicitation of members of The Better Union in petitioner's plant or on petitioner's time or that the petitioner or any of its supervisory employees ever solicited or requested any employee to form or join any

†The details of the formation of The Better Union are set forth in the dissenting opinion of Circuit Judge Major, and, for the convenience of this Court, such opinion is printed as an appendix to petitioner's supporting brief.

organization. The Board stipulated that if called as witnesses all of the members of The Better Union would testify that they had never been told by any officer or supervisory employee of petitioner to join The Better Union (R. A. 158-159).

Mr. Irving Flamberg is petitioner's president. He resides in New York and comes to Fairfield for about one or two days a month (B. A. 248). Mr. T. O. Leary came to Fairfield as the petitioner's plant manager in July, 1940 (B. A. 19). Carrie Schumacher, Emma Shehorn, Perry Musgrave and Fay Humphrey are supervisory employees (B. A. 364). Jesse R. Baker was in petitioner's employ as a supervisory employee, but his employment was terminated in March, 1941 (B. A. 28-29). Plant Manager Leary was the only employee having authority to hire, fire or lay off employees (R. A. 19-20).

Carrie Schumacher, Emma Shehorn, Perry Musgrave and Fay Humphrey were among those who attended the first meeting of The Better Union* and they also attended some of its subsequent meetings. There was no finding or evidence that their attendance at such meetings was other than of their own volition or that they engaged in any union activity other than the attending of union meetings. Schumacher testified that her attendance at union meetings was her own idea and "was (her) privilege" (R. A. 176).

The Board found that petitioner failed to "restrain" Schumacher, Shehorn, Perry Musgrave and Humphrey from attending such meetings (B. A. 366), and that they continued "unchecked" to attend meetings of The Better Union "and continued thereby to throw (this petitioner's) support to that organization" (B. A. 363). The Court below sustained such finding and conclusion (A. P. 324-326).

*Carrie Schumacher and Emma Shehorn had previously attended a meeting of the International and had been well received at such meeting (B. A. 236-237; R. A. 177).

When Leary came to the plant as manager in July, 1940, he called a meeting of all employees, introduced himself, and, among other things, informed them that the plant had been and was losing money and that unless production was increased and losses stopped, the company would be compelled to close the plant (R. A. 93-94). At that meeting he also told the employees that he intended to make some changes, that he was in sole charge and that no one other than he would have authority to hire, fire or lay off employees (R. A. 19-20, 93-94).

Thereafter, on about September 15, 1940, International Ladies' Garment Workers' Union undertook the organization of petitioner's employees (B. A. 345), and distributed literature inviting "all workers" or "employees" of petitioner to attend (Bd.'s Ex. 4, B. A. 40, 311, 312, R. A. 22). Its first meeting was held in October, 1940, and supervisory employees Carrie Schumacher and Emma Shehorn were among the employees who attended (B. A. 236-237; R. A. 177). Said union "treated (them) nice and didn't make any difference between (them) and any of the employees that were there" (R. A. 177; B. A. 237-238, 255). At such meeting a number of employees indicated their desire to join said union (R. A. 178-180; B. A. 238). None of them have been laid off or discharged and some of them are among the employees who were at a later date assigned to the most desirable and profitable work in the plant (R. A. 24-25, 178-180). On October 22, 1940, said union granted a charter to International (B. A. 346).

In November, 1940, International published a bulletin stating the names of the nine employees who had been elected as officers and board members. There is no claim or evidence that any of such officers or board members have been laid off, discharged or in any way discriminated against. Some of them have been placed at the most desirable and profitable work (R. A. 24, 28). When petitioner discontinued the department in which some of Interna-

tional's officers and active members were employed, petitioner did not lay them off, but found new and more profitable work for them in another department (R. A. 25, 27, 31-32).

On December 10, 1940, the petitioner's president, Mr. Flamberg, and Manager Leary met in a conference with the International's organizer and its president and secretary (B. A. 105, 110, 114, 172). (There is no claim that the International ever represented a majority of petitioner's employees.) In such conference Mr. Flamberg told the International representatives that petitioner would recognize and bargain with the International or with any organization selected by a majority of the employees, that he had no choice in the matter at all, and "was not fighting unions" (B. A. 116). The International secretary, Board witness Kittel, testified that at the conference Mr. Flamberg and Manager Leary made very clear that the Company intended to abide by the law in every respect (R. A. 72), and that no discrimination against any employee on account of union membership would be tolerated (R. A. 75) and that International representatives were requested by Mr. Flamberg and Manager Leary to call to Leary's personal attention anything which they might feel was a discrimination against any of their members (R. A. 75-76). In response to a request by the International organizer, Mr. Flamberg consented that International might publish a statement setting forth the Company's attitude and quoting Mr. Flamberg's statements as above set forth (B. A. 116).

As the International continued with its organizational efforts it encountered opposition on the part of a considerable number of petitioner's employees (B. A. 129, 190-191, 206-209, 212, 223-227; R. A. 101-102, 108, 111, 118, 123, 124, 126-127, 128, 131, 134, 135, 136, 137, 138, 142, 143-145, 157-158, 194, 199).

A few days after the December 10, 1940, conference be-

tween International representatives and Mr. Flamberg and Manager Leary, the International published and distributed among all of the employees (B. A. 116, 122) a circular (R's Ex. 3, R. A. 216-218, 245) incorporating a report of such conference and setting forth in great detail the assurances and statements made by Mr. Flamberg and Manager Leary in such conference as aforesaid. Said circular carried the headline "Flamberg Promises to Deal With Union Majority," and, among other things, set forth that Mr. Flamberg had declared his willingness "to deal with the Union" whenever a majority was reached and that he had pledged that no worker would be discriminated against for Union membership.

By December 17, 1940, there had developed considerable bitterness between members and nonmembers of the International (R. A. 122-123). On the night of December 17, 1940, the International gave a Christmas party for its members (B. A. 190, 192) and employees who were not members were not invited (B. A. 182). Thereupon, on the night of December 19, 1940, a number of employees who were not members of International gave a pound party at the home of employees Pearl Turner and her husband, Otis Turner (B. A. 190, 191), and members of International were not invited (B. A. 182). The idea of giving the pound party originated with Pearl Turner and a number of her fellow workers (B. A. 190). Pearl Turner testified that they gave the pound party because "we were spatting backwards and forwards and we did it more to outsmart the other side, * * *" (B. A. 191). There were about 70 persons at the pound party (B. A. 175), of whom about 40 or 45 were employees at the plant (B. R. 175-176). Perry Musgrave was invited by Otis Turner and attended the pound party (R. A. 104). Musgrave and Turner had been friends and associated with each other over a number of years (R. A. 104, 119, 120; B. A. 193-194). In the course of the party employees Harri-

son and Cross started a discussion about the union question (R. A. 39-40, 106). Some of the employees stated that if they needed a Union they preferred to have one of their own (R. A. 46) and most of them were in favor of organizing a union (R. A. 52). None of the group knew how to proceed towards forming a union and they delegated employee Clem Anthis to seek counsel as to the procedure for forming an organization (R. A. 52-53, 106, 111; B. A. 62, 197, 198). Perry Musgrave was not in the group which was discussing the union question (R. A. 110, B. A. 62).

Thereafter, on the night of December 26, 1940, Anthis obtained permission from the City Council to hold a meeting at the City Hall on the following night (B. A. 218). Anthis called at the office of Attorney Brown and steps were taken to form an independent organization (B. A. 209, 210, 220-221). On the evening of December 27, 1940, a public meeting was held at the City Hall and about 100 employees attended (B. A. 63, 192). Anthis opened the meeting and Attorney Brown made a talk and read a proposed constitution and by-laws for The Better Union (B. A. 192, 198). Various speakers addressed the meeting and told the employees they had the right to join or refrain from joining the International, The Better Union or any organization (R. A. 51). Between 90 and 96 employees joined The Better Union and signed the Constitution and by-laws at such meeting.

On January 2, 1941, a Fairfield newspaper published an article which inferred that the Company was hostile to an outside union (B. A. 329).* (On January 3, 1941, The Better Union already had a majority membership [R's Ex. 17, B. A. 249, 323].) Manager Leary sent the clipping to Mr. Flamberg in New York, and a few days later Mr. Flamberg sent such newspaper a letter (R's Ex. 7, B. A. 187, 320), wherein he demanded a retraction and requested that the

*The Board found that responsibility for said article is not chargeable to the petitioner (B. A. 364, footnote 13).

newspaper publish his letter and also a notice which was being posted on the plant's bulletin board. The newspaper published a retraction and a copy of such notice (B. A. 187; R's Ex. 12, R. A. 234).

Said notice, which was posted on the plant's bulletin board (R's Ex. 8, B. A. 187, 321), informed the employees, among other things, that the Company had no interest in the success or failure of either of the two unions other than the normal interest in the gaining of whatever representation or other advantages they may wish rightfully for themselves. On January 15, 1941, the petitioner posted a further notice on its bulletin board (B. A. 187; R's Ex. 9, B. A. 322) stating that the Company has been and will continue to be neutral and has no connection with any of the organizations involved in the controversy and warning that any employee, including foremen and foreladies, found guilty of making statements purporting to reflect the Company's opinion and policies would be instantly discharged.

Board witness Kittel testified that during the period in question he observed Anthis in the manager's office more frequently than usual; that Anthis would be absent from the building in which he worked and that he had seen Anthis in the office, sitting on Leary's desk smoking cigarettes (B. A. 357-358). Anthis is paralyzed and moves on crutches (R. A. 70, 157). Frequently, while in the office on business, employees smoke cigarettes (R. A. 74-75). Leary's desk is flat top and often times persons while in the office talking to Leary sit on the desk (R. A. 156-157, 201-202). Leary and Anthis testified that the duties of Anthis as stamp boy and filling out work tickets required his frequent coming to the office (R. A. 141, 156, 199).

On November 19, 1940, Baker stopped at the machine of Arline Potts, the recording secretary of the International, and showing her an International bulletin, said, "I have an invitation from the Union to come to their meeting tonight" (B. A. 41). Potts had known Baker for

a long time, he was a friendly person and was friendly toward her and at various times would stop and chat with her and with other employees at their machines (R. A. 22-23). In such conversation Baker told Potts that all of the officers selected by International were all right with the exception of Willene Shaw (B. A. 41). As to Willene Shaw, Baker said only that "she was a rotten operator and hadn't made the Code,* and if she didn't make it in the next two weeks she would be fired"** (B. A. 41). Baker also said that employee Lorene Turner (wife of the International sergeant-at-arms) talked too much at work and didn't try (R. A. 24) and that if Lorene Turner would talk less and work harder she could earn more (R. A. 23, B. A. 41). Baker told Potts, "Personally, I am not for the Union" (B. A. 41, and made other statements as to his views concerning unions and his own experience as a union member (B. A. 41-42). Potts testified that Baker also said the Company was losing a lot of money, that the employees were not working hard and that "if the Company kept losing money they would be compelled to close on account of the Union" (B. A. 42). Potts admitted that she understood that Baker was expressing his personal views and that he had not said that those were the views of the Company (R. A. 23, 28). Employee Goldie Manlove testified to the effect that in a conversation with her Baker had spoken in uncomplimentary terms about unions (R. A. 29). Manlove subsequently became a member of the International (B. A. 54). She, too, has since been promoted to more desirable and profitable work (R. A. 24-25).

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*Petitioner's employees are, generally, paid on a piece-rate basis. All are subject to the provisions of the Fair Labor Standards Act. When an employee on a piece-rate basis fails to earn the minimum wage (generally referred to as the "Code") at the rate provided, the difference is "make-up" paid by petitioner (B. A. 349).

**Willene Shaw (president of International) testified that Baker criticised her failure to earn the "Code" and warned her that she would have to earn the Code during the following two weeks, and that following such warning she continued to have "make-up" (R. A. 93; B. A. 166-167). However, Shaw was not laid off or discharged.

Jewell Elliott testified that about October 15, 1940, Baker came up to her machine where she was talking with two other employees (B. A. 57). He explained to her that under the law the Company could not permit employees to engage in union activities at the plant and that if the Company did permit such activities in the plant the Company would be taken before the Labor Board (R. A. 32);† that she told Baker she had not been talking about the union (R. A. 32-33), and that the incident then ended. Elliott testified that at about that time Baker told her that Manager Leary had instructed him not to discuss or have anything to do with the Union question and that the Company would not stand for him taking any part in the matter (R. A. 33). Elliott and Baker were on very cordial terms and had a high regard for each other (R. A. 29-30). When the department in which Elliott worked was discontinued the petitioner gave her more profitable work in another department (R. A. 31-32).

Elliott testified that she and Emma Sheehorn were and are good friends (B. A. 56-57, R. A. 31); that during the lunch hour one day in October, 1940, she went up to where Sheehorn was sitting (R. A. 30-31, B. A. 56); that some of the girls walked up and someone asked Elliott if she was for the Union; Elliott said that she was, and Shehorn asked her why; Elliott replied that her father had always belonged, and Shehorn said, "I think it is all hooey and ought to be stopped," and that "that is all (Shehorn) said" (B. A. 56-57). Elliott further testified that, since they are good friends, she was not afraid of Shehorn knowing that she was for the Union, that Shehorn was a very fair person and would not interfere with any of her (Elliott's) rights (R. A. 31); that on the day after such conversation she (Elliott) joined the International (B. A.

†Picking out an isolated part of Elliott's testimony (B. A. 57-58) and ignoring the part above stated, the Board found (B. A. 347) that "Baker • • • threatened to take (Elliott) before the Labor Board. Elliott replied that they had not been talking about the Union, to which Baker then said, 'Well, we better not catch you talking it.'"

56), and that while riding home with Shehorn in January, 1941, Shehorn told her that Manager Leary had instructed "us" (the supervisory employees) that they were not to discuss union matters with any employee (R. A. 34).

The only other statements attributed to Baker were statements which Arlene Potts testified Baker made on the night of December 27, 1940. Potts' testimony with respect thereto was as follows:

On the night of December 27, 1940, Potts and three other members of the International were sitting in an automobile which was parked in front of the City Hall where The Better Union was holding its organizational meeting (B. A. 43). They saw Baker passing by and called him over to their car (R. A. 25). They asked Baker if he was going to the meeting, and, if so, if they could go with him. Baker replied that he was not going to the meeting, but was on his way to the corner store to buy a magazine (B. A. 43). There then ensued a casual conversation with Baker which they prompted (R. A. 25-26). All statements made by Baker were in answer to questions that they brought up (R. A. 26). Potts and her companions brought up the Union question and Baker promptly protested against engaging in any discussion "about the union" (B. A. 43, 49; R. A. 26). In the course of answering questions asked by them Baker said that there was no law which could keep the Company from moving the factory if it so desired (B. A. 43); he mentioned that some plant at Flora (Illinois) had moved on account of Union activities (R. A. 43), but stated that the petitioner would not move its plant on account of Union activities (R. A. 26, B. A. 49).

Manager Leary testified that he warned Baker and the other employees against any interference with the organizational rights of the employees (B. A. 271, 273); that he questioned Baker concerning rumors that Baker had made some statements on the Union question, and Baker denied having done so (B. A. 279). There was no evidence that

any of the statements attributed to Baker or the statement attributed to Emma Sheehorn were ever reported to anyone by the persons to whom they were made or that any member or members of The Better Union ever had any knowledge of the making of any of such statements.

About December 4, 1940, the "joining fronts" department was overmanned and there was a shortage of work in that department (B. A. 37, 252-253; R. A. 17-18, 96). Thereupon, the petitioner laid off Mina Hale and Dora Sanders, both of whom worked in that department (R. A. 18-19; B. A. 140). Dora Sanders was not a member of the International (R. A. 80), and Mina Hale was a member. There was no evidence that the petitioner knew that Hale was a member of the International. Through some confusion with respect to finishing some bundles of work, Sanders came back on two following days (B. A. 253, 261). Neither Sanders nor Hale have been returned to work (B. A. 263), Hale's machine is still unused (R. A. 91), and no new employees have been employed in that department (R. A. 205).

Two members of International Ladies' Garment Workers Union (B. A. 164; R. A. 92), Helen Harrelson and Paula Sheehorn, have since been hired in another department. The Board found that the petitioner, "by discharging Hale and refusing to reinstate her, discriminated in regard to the hire and tenure of her employment, thereby discouraging membership in the Union * * *" (B. A. 348-355). The court below sustained such finding (A. P. 326).

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

I.

In sustaining the Board's finding and conclusion that it was the petitioner's duty under the Act to "restrain" the attendance at meetings of The Better Union by foremen and foreladies (whose attendance at such meetings constituted their sole union activity and was not found to be other than of their own volition), and that said employees, by continuing "unchecked" to attend such meetings "continued thereby to throw (the employer's) support to that organization," the Circuit Court of Appeals for the Seventh Circuit has

(a) decided an important question respecting the union rights of supervisory employees under the National Labor Relations Act and the employer's duties and obligations with reference thereto, which question has not been, but should be, settled by this Court; and,

(b) rendered a decision in conflict with the decisions on the same matter by the Circuit Courts of Appeals for the Second Circuit and the Eighth Circuit, respectively, and which are to the effect that a foreman is an 'employee' within the meaning of the Act and entitled to its protection against discrimination and interference by the employer. Said decisions are:

National Labor Relations Board v. Luxuray, Inc., 123 F. (2d) 106, 108 (C. C. A. 2);

National Labor Relations Board v. Skinner & Kennedy Stationery Company, 113 F. (2d) 667, 670, 671 (C. C. A. 8).

II.

The decision and order of said Circuit Court of Appeals that petitioner post notices stating that its employees are free to become or remain members of the International, and that the petitioner will not discriminate against any em-

ployee because of membership or activity "in that organization," but which fail to state and inform the employees that they are free to join or organize any union they choose without being limited to the International, is in conflict with the decisions on the same matter by the Circuit Courts of Appeals for the Second Circuit, the Third Circuit, the Sixth Circuit and the Eighth Circuit, respectively, and which are to the effect that good faith requires that an employee's freedom to join or form any union he may choose should be clearly stated in any notice posted and not left to inference. Said decisions of said Circuit Courts of Appeals are:

Westinghouse Electric & Mfg. Co. v. National Labor Relations Board, 112 F. (2d) 657, 661 (C. C. A. 2), affirmed per Curiam in 312 U. S. 660;

National Labor Relations Board v. Baldwin Locomotive Works, 128 F. (2d) 39, 51 (C. C. A. 3);

National Labor Relations Board v. American Rolling Mills Co., 126 F. (2d) 38, 42 (C. C. A. 6);

Cudahy Packing Co. v. National Labor Relations Board, 102 F. (2d) 745, 753 (C. C. A. 8).

III.

In granting and making a blanket injunctive order against petitioner upon the limited findings of unfair labor practices in this case, and in view of the lack of anti-union history of petitioner, the neutrality of the petitioner's president and the fact that Baker's employment had been terminated prior to the hearing—the said Circuit Court of Appeals has enjoined petitioner from committing any act in violation of the National Labor Relations Act, however unrelated it may be to those found and in the absence of any danger of their commission in the future, and has decided a federal question in a way probably in conflict with the applicable decision of this Court in

National Labor Relations Board v. Express Publishing Co., 312 U. S. 426, 433-437.

IV.

The said Circuit Court of Appeals has misconstrued the rule and principle announced by this Court in National Labor Relations Board v. Link-Belt Company, 311 U. S. 584, 599, with the result that the statements of Baker were not considered by said Circuit Court of Appeals in their setting and background.

V.

The Board's findings that petitioner has engaged in unfair labor practices within the meaning of Section 8 (1), (2) and (3) of the Act are not supported by substantial evidence and the Board's order is not supported by the record.

VI.

The official opinion of a member of a United States Circuit Court of Appeals that the Board's decision is one such as is "calculated to bring the National Labor Relations Act into disrepute" raises a question of high importance which ought to be decided by this Court.

National Labor Relations Board v. Waterman Steamship Corporation, 309 U. S. 206, 208-209.

PRAYER.

For the purpose of correcting the errors complained of and for as much as petitioner is aggrieved by the said decision and decree of the Circuit Court of Appeals for the Seventh Circuit, and to the end that the rights of the petitioner may be determined in accordance with the law, your petitioner respectfully prays that a writ of certiorari be issued under the seal of this Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding it to certify and send to this Court on a day certain, to be therein designated, a full and complete tran-

script of the records and proceedings of the said Circuit Court of Appeals in the within-described cause of "National Labor Relations Board, Petitioner, v. Aintree Corporation, Respondent, Cause No. 8028," to the end that the judgment and decision of said Circuit Court of Appeals in said cause may be reviewed by this Court as provided by law, and that your petitioner may have such other relief as to this Court may seem appropriate, and that the judgment and decision of the said Circuit Court of Appeals may be reviewed by this Honorable Court.

HYMAN G. STEIN,
Attorney for Aintree Corporation,
Petitioner.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1942.

AINTREE CORPORATION,
a Corporation,
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD,
Respondent.
No. .....

SUPPORTING BRIEF.

I.

OPINION OF THE COURT BELOW.

The majority opinion of the Circuit Court of Appeals for the Seventh Circuit appears at pages 321-327, inclusive, of the Appellate proceedings below, printed under the supervision of the clerk of this Court. Said opinion has not yet been reported.

The dissenting opinion of Circuit Judge Major appears at pages 327-332, inclusive, of said printed record of the Appellate proceedings below, and is printed as an appendix hereto.

The decree of said Circuit Court of Appeals appears at pages 336-338, inclusive, of said printed record of the Appellate proceedings.

The decision and order of the National Labor Relations Board appears at pages 341-371, inclusive, of the appendix to the brief of the Board (petitioner below), and is reported in 37 National Labor Relations Board Decisions 1174.

II.

JURISDICTION OF THIS COURT.

A statement particularly disclosing the basis upon which it is contended that this Court has jurisdiction to review the judgment and decree in question appears at pages 3-4, inclusive, of the petition for writ of certiorari, and in the interest of brevity such statement is not here repeated.

III.

DATE OF FINAL JUDGMENT BELOW.

The date of the order of said Circuit Court of Appeals that the Board's petition for Enforcement of its order be granted is November 12, 1942 (A. P. 333). Petitioner's petition for rehearing was duly filed in said Circuit Court of Appeals on November 27, 1942 (A. P. 333), and was denied on December 4, 1942 (A. P. 336).

The decree of said Circuit Court of Appeals for the Enforcement of the Board's order was made and entered on December 4, 1942 (A. P. 336-338).

IV.

STATEMENT.

A full statement of the case has been made in the petition for writ of certiorari, and in the interest of brevity the statement is not here repeated.

V.

SPECIFICATIONS OF ERROR.

The Circuit Court of Appeals for the Seventh Circuit erred:

1. In sustaining the Board's finding and conclusion that, under the National Labor Relations Act, the petitioner was required to restrain its foremen and foreladies from attending meetings of The Better Union and that petitioner's failure to so restrain them was an unfair labor practice.

2. In sustaining the Board's finding and conclusion that, by continuing "unchecked" to attend meetings of The Better Union, the petitioner's foremen and foreladies "continued thereby to throw (the petitioner's) support to that organization."

3. In granting and making an order that the petitioner post notices which state only with respect to the employees' organizational rights, that the employees are free to become or remain members of the International and that the petitioner will not discriminate against any employee because of membership or activity "in that organization," and which fail to state and inform the employees that they are free to join or organize any union they choose without being limited to the International.

4. In granting and making a blanket injunctive order against this petitioner.

5. In holding and deciding that the Board's findings that petitioner had engaged in unfair labor practices within the meaning of Section 8 (1), (2) and (3) of the Act are supported by substantial evidence.

6. In holding and deciding that the Board's order is supported by the record.

ARGUMENT.

POINT I.

(Assignment of Errors 1 and 2.)

This Court should resolve the dilemma in which this petitioner and employers generally have been placed by the decision in this case. In the cases hereinafter quoted from, the Circuit Courts of Appeals for the Second and Eighth Circuits have held and decided that a foreman is an employee within the meaning of the Act, and that an employer is guilty of unfair labor practices if he restrains or interferes with a foreman in the foreman's exercise of his union rights as guaranteed under the Act. In this case the petitioner's foremen and foreladies, in the exercise of the rights guaranteed employees under the Act, attended meetings of The Better Union. Such attendance constituted their sole union activities and was not found to have been other than of their own volition. The Circuit Court of Appeals for the Seventh Circuit has held the petitioner guilty of unfair labor practices because the petitioner failed to "restrain" its foremen and foreladies from attending such union meetings, and has held that said employees, by continuing "unchecked" to attend such meetings "continued thereby to throw (the petitioner's) support to that organization."

In National Labor Relations Board v. Skinner and Kennedy Stationery Company, 113 F. (2d) 667, 670-671, the Circuit Court of Appeals for the Eighth Circuit said:

> "It is first argued that Eckert is not an employee within the meaning of the Act. * * * a foreman, in his relation to his employer, is an employee, * * *. Nothing in the Act excepts foremen from its benefits nor from protection against discrimination nor unfair labor practices of the master."

In National Labor Relations Board v. Luxuray, Inc., 123 F. (2d) 106, 108, **International Ladies' Garment Workers' Union** had complained that one Ethel Weller, a forelady employed by the respondent in that case, had been discharged on account of membership in said Union. The Circuit Court of Appeals for the Second Circuit upheld the Board's order that she be reinstated with back pay. In its opinion the Court said:

> "Mrs. Weller had acted as a forelady * * *. She had been a member of the (International Ladies' Garment Workers' Union) for about nine months before she was laid off, had been conspicuously active in the Union organization, and had had weekly meetings held for that purpose at her house."

The petitioner's predicament is aptly described in the dissenting opinion of Circuit Judge Major (A. P. 332) as follows:

> "* * * Moreover, what was (petitioner) to do? If it had discharged such supervisory employees for attending or joining either of these Unions, it no doubt would have been charged with discrimination. Such was the predicament of the employer in National Labor Relations Board v. Luxuray, Inc., 123 Fed. (2d) 106, 108. * * *."

We respectfully submit that this question is one of high and general importance, and that this Honorable Court should review the decision of the Court below and announce the rule and law respecting the rights of a foreman under the Act and the employer's duties and obligations with reference thereto.

POINT II.

(Assignment of Error 3.)

The Board's order (B. A. 371) and the decree of the Court below (A. P. 338) require and direct that the petitioner post notices to its employees stating with respect to

their rights under the Act that the employees "are free to become or remain members of (International), and that the (petitioner) will not discriminate against any employee because of membership or activity in that organization."

In National Labor Relations Board v. Baldwin Locomotive Works, 128 F. (2d) 39, 51, the Circuit Court of Appeals for the Third Circuit said:

> "Good faith in the effectuation of that intent and spirit requires that an employee's freedom to join any union he may choose be made clear and not left to inference."

In Westinghouse Electric & Mfg. Co. v. National Labor Relations Board, 112 F. (2d) 657, 661 (affirmed per curiam in 312 U. S. 660), the Circuit Court of Appeals for the Second Circuit said:

> "To post notices that the 'Independent' has been 'disestablished,' and to say nothing more, may well lead the employees to conclude that any unaffiliated union will fall under the same ban. * * * rigid impartiality between all kinds of organizations * * * demands public declaration that after (the Independent) has been 'disestablished' the field will be open for the employees' choice of any form they prefer.' For this reason Article II (a) of the order will be modified by adding the following suffix: 'but the employees are free to organize any union they choose, whether or not it is affiliated with a national union.' "

In National Labor Relations Board v. American Rolling Mill Co., 126 F. (2d) 38, 42, the Circuit Court of Appeals for the Sixth Circuit said:

> "Paragraph 2 (b) of the order by which the Board required the posting of appropriate notices should be so amended as to have added to the end of the paragraph the following: 'but that the employees are free

to organize or join any union they choose whether affiliated with a national union or one without any affiliation.' "

To the same effect is the decision of the Circuit Court of Appeals for the Eighth Circuit in Cudahy Packing Co. v. National Labor Relations Board, 102 F. (2d) 745, 753.

POINT III.

(Assignment of Error 4.)

Notwithstanding the total absence of any evidence that petitioner has any antiunion history, or that petitioner has ever fostered company unions, broken strikes or been guilty of espionage, and upon evidence which has prompted one member of the Court below to characterize the Board's decision as "calculated to bring the National Labor Relations Act into disrepute * * *," the Court below has ratified just such a drastic and blanket injunctive order against this petitioner as has heretofore been held applicable in the case of notorious labor baiters whose activities had run the gamut of every known form of unfair labor practice.

There is no reported case in which such a general injunction was sustained upon findings of conduct so mild and isolated as those alleged in the instant case, and this is so without taking account of the fact that the Board was required to make strained references and forced deductions in order to find even such acts.

The summary of the evidence made by the Court below respecting petitioner's alleged violations of the Act are that Baker, whose employment had been terminated prior to the time of the hearing (B. A. 28-29), expressed his disapproval of unions; the foremen and foreladies (in the exercise of their rights) attended meetings of The Better Union; Clem Anthis visited the manager's office "with a

frequency that had not been observed previously and he was frequently seen sitting chatting with Leary;" and one member of the International was discharged because of unspecified "activities on behalf of International." *

The petitioner's president took vigorous action to assure not only its employees, but the representatives of the International, that the rights of the employees under the act would be duly respected and that no discrimination against them would be tolerated (B. A. 362). There is no evidence and no finding that the efforts and statements of the petitioner's president and plant manager were insincere. Without any legal obligation so to do, the petitioner's president and plant manager met with representatives of the International on December 10, 1940, and went to unusual lengths in their efforts to make absolutely known to the employees that they were free to take such action as they desired with respect to union affiliation and activities (B. A. 105, 110, 114, 116, 122; R. A. 72, 75).

In National Labor Relations Board v. Express Publishing Co., 312 U. S. 426, 433, 434, 435, 436, 437, this Court said:

> "But we think it does not follow that, because the act of respondent which the Board has found to be an unfair labor practice defined by Sec. 8 (5) is also a technical violation of Sec. 8 (1), the Board, in the circumstances of this case, is justified in making a blanket order restraining the employer from committing any act in violation of the statute, however unrelated it may be to those charged and found, or that courts are required for the indefinite future to give effect in contempt proceedings to an order of such breadth.

*The nonconflicting evidence shows that other and more active union members were retained and even given more profitable and more desirable work; that the president of International, Willene Shaw, was retained despite the fact that, following a warning respecting her work, she continued to fail to earn the amount of the "code"; and that two new employees (Paula Sheehorn and Helen Harrelson) subsequently hired in another department were also members of the International.

"We cannot find such authority or requirement in the carefully chosen language of Sec. 10 (c), which directs the Board to state its findings of fact showing the unfair labor practice charge and to order the person accused to 'cease and desist from such unfair labor practice,' or in Sec. 10 (e) of the Act which authorizes the court on application of the Board to enter a 'decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board.' It is obvious that the order of the Board, which when judicially confirmed, the courts may be called on to enforce by contempt proceedings, must, like the injunction order of a court, state with reasonable specificity the acts which the respondent is to do or refrain from doing. It would seem equally clear that the authority conferred on the Board to restrain the practice which it has found the employer to have committed is not an authority to restrain generally all other unlawful practices which it has neither found to have been pursued nor persuasively to be related to the proven unlawful conduct.

"Congress has itself afforded a guide pointing to the appropriate limits of the order which the Board is to make in restraining unfair labor practices. By its definition and classification of unfair labor practices in the statute it has shown that they are not always so similar or related that the commission of one necessarily merits or rightly admits of an order restraining all."

* * * * * * *

"But the mere fact that a court has found that a defendant has committed an act in violation of a statute does not justify an injunction broadly to obey the statute and thus subject the defendant to contempt proceedings if he shall at any time in the future commit some new violation unlike and unrelated to that with which he was originally charged."

* * * * * * *

"The breadth of the order, like the injunction of a court, must depend upon the circumstances of each

case, the purpose being to prevent violations, the threat of which in the future is indicated because of their similarity or relation to those unlawful acts which the Board has found to have been committed by the employer in the past."

* * * * * * *

"To justify an order restraining other violations it must appear that they bear some resemblance to that which the employer has committed **or that danger of their commission in the future is to be anticipated from the course of his conduct in the past.**" (Emphasis ours.)

What is there in this record to justify a conclusion that danger of every form of coercive action is to be anticipated? The Board's findings are primarily based upon alleged statements of Baker. But the record shows that Baker is no longer in the company's employ (B. A. 28-29). The court below did not find that any supervisory employee other than Baker made any "coercive" statements. And the Board as well as the court below have recognized in their respective opinions that the company's president and its plant manager issued instructions that the supervisory employees were not to interfere with the organizational rights of the employees (B. A. 348, 362, 364; A. P. 324).

POINT IV.

(Assignment of Errors 5 and 6.)

In the dissenting opinion of Circuit Judge Major there is a full and fair resume and consideration of the petitioner's freedom from any anti-union history, the "setting" and background in which Baker's statements were made, and the evidence with respect to Clem Anthis. Such dissenting opinion further points out that:

"The unfavorable background, so heavily stressed by the Supreme Court in cases such as International

> Association of Machinists, Tool and Die Makers v. National Labor Relations Board, 311 U. S. 72, and National Labor Relations Board v. Link-Belt Company, 311 U. S. 584, places the instant case in a different category."

We respectfully refer to such dissenting opinion in support of our contentions that the Board's findings that petioner has engaged in unfair labor practices are not supported by substantial evidence, that the Board's order is not supported by the record, that the Board and the Court below completely ignored the petitioner's background, and that the Court below has misconstrued the decision of this Court in National Labor Relations Board v. Link-Belt Company, 311 U. S. 584, 599, and has failed to consider the statements of Baker "in their setting."

We respectfully add the following with respect to the decision that Mina Hale was discriminatorily discharged.

There was no evidence that the petitioner had any knowledge that Mina Hale was a member of the International at the time of her lay-off. Hale was not an officer or board member of the International. Her sole union activities were that she attended meetings of the International and told several of the employees that she thought "the union was for our benefit" (B. A. 127, 156).

The nonconflicting evidence conclusively establishes that the department in which Hale worked was overmanned (B. A. 37, 252-253; R. A. 17-18, 96). Dora Sanders, a nonmember of International, as well as Hale, was laid off (R. A. 18-19, 80; B. A. 140). There is no evidence or claim that any officer or board member of the International was discharged or in any way discriminated against. If the petitioner had desired to discharge a union member, it could have discharged the president of International, Willene Shaw, for she herself testified that even following a warning from Baker respecting her work

and his having given her two weeks time in which to improve, she continued to fail to earn the "Code" (R. A. 93; B. A. 166-167).

Like Hale, Dora Sanders has not been returned to work (B. A. 263). No new employees have been hired in Hale's department (R. A. 205). Hale's machine is still unused (R. A. 91). Two new employees hired in another department were members of International Ladies' Garment Workers Union (B. A. 164; R. A. 92).

It was and is the Company's position that when Hale's department became overmanned, it undertook to lay off the two employees whom it deemed to be of less value to the business than the employees retained. The Board contends that Hale was not one of the least valuable employees. The Board, therefore, is in the position of contending that the petitioner's said basis for the selection of the two employees to be laid off was incorrectly applied with respect to Hale. We respectfully submit that even if it be held that the petitioner was in error in considering Hale one of the least valuable employees in her department, there is no evidence that the same was occasioned by or due to her union activities.

In The Associated Press v. National Labor Relations Board, 301 U. S. 103, 132, this Court said:

> "The Act permits a discharge for any reason other than union activity or agitation for collective bargaining."

In Hazel-Atlas Glass Company v. National Labor Relations Board, 127 F. (2d) 109, 114, 116, the Circuit Court of Appeals for the Fourth Circuit said:

> "The issue drawn, as we have seen, is whether these men lost their positions because of union activities or because they were deemed by the employer to be of less value to the business than the workmen selected

for retention when a decline in business necessitated a reduction of the force. The burden of proof was of course upon these complainants, and the case as to these men must fall if it appears that there was no substantial evidence of unlawful discrimination, and that the findings of the Board against the employer rest upon nothing more solid than speculation or conjecture. * * *"

* * * * * * *

"There was of course ample room for difference of opinion or mistake or favoritism or other circumstances, irrelevant to this inquiry, affecting the judgment of the foremen who made the selections." (Emphasis ours.)

In American Smelting & Refining Co. v. National Labor Relations Board, 126 F. (2d) 680, 687, the Court said:

"Behney was not high in the councils of the union and there is no claim that those who were officers or active in the union's affairs were discriminated against."

CONCLUSION.

It is respectfully submitted that this Case is one calling for the exercise by this Court of its supervisory powers by granting a writ of certiorari, and thereafter reviewing and reversing the decision below.

Respectfully submitted,

HYMAN G. STEIN,
Attorney for Aintree Corporation,
Petitioner.

APPENDIX.

In the
UNITED STATES CIRCUIT COURT OF APPEALS
For the Seventh Circuit,

October Term and Session, 1942.

No. 8028.

National Labor Relations Board, Petitioner,

vs.

Aintree Corporation, Respondent.

Petition for Enforcement of an Order of the National Labor Relations Board.

November 12, 1942.

Before Evans, Major and Kerner, Circuit Judges.

* * * * * * *

Major, C. J., Dissenting:

I am aware of the futility of taking issue with the Labor Board, but my study of the record leaves no alternative. Notwithstanding the fact that we are bound by findings of the Board, if substantially supported, I am unable to reconcile myself to the theory that we are merely a "rubber stamp." If so, the "right of review" is without potency and becomes an idle and useless ceremony.

The unfavorable background, so heavily stressed by the Supreme Court in cases such as *International Association of Machinists, Tool and Die Makers v. National Labor Relations Board,* 311 U. S. 72, and *National Labor Relations Board v. Link-Belt Company,* 311 U. S. 584, places the instant case in a different category. This background, however, has been completely ignored by the Board. There is not a scintilla of evidence of any anti-union history,—that respondent has ever fostered company unions, broken

strikes, been guilty of espionage or of any character of hostility against or favoritism toward any union or member thereof. When this background is considered, the few picked and garbled statements relied upon by the Board are insignificant. As said by the Supreme Court in the Link-Belt case, on page 599:

"If the words or deeds of the supervisory employees, taken in their setting, were reasonably likely to have restrained the employees' choice and if the employer may fairly be said to have been responsible for them, they are a proper basis for the conclusion that the employer did interfere."

In the instant case, the record discloses conclusively, in my judgment, that the statements relied upon did not restrain the employees, and, furthermore, that the management was not responsible for such statements.

Most of the statements relied upon are chargeable to Baker, who was respondent's production manager. In July of 1940, one Leary was installed as respondent's plant manager. At that time, respondent was in a precarious condition financially. Leary called a meeting of the employees and informed them that production would have to be increased or the company would be compelled to close its plant. He told them that he was in sole charge and that no one other than he would have authority to hire, fire or lay off employees, and that all orders would be issued by him. It was subsequent to this that an organizer appeared on the scene, for the purpose of organizing the International.

The two main witnesses relied upon by the Board to show restraint or coercion are Potts and Manlove. The former testified that she "certainly" understood that Baker was merely expressing his own opinion and not the view of the company. Potts, who was an officer of the International, continued as such and was actually promoted to a better paying position. Manlove also testified that she understood Baker was merely expressing his own opinion. She became a member of the International, and shortly afterwards was also promoted to a better paying position. Neither Potts nor Manlove reported the statements relied upon to any of

their fellow employees, to the International organizer or to the management. There is not the slightest ground for the inference that these two employees were coerced or interfered with, and certainly statements made to them and unreported could not have influenced any other employee.

The statement attributed to Baker on the night of December 27, and the circumstances surrounding the same, are stressed. On that evening four members of the International were stationed in an automobile which was parked in front of the City Hall where The Better Union was holding its meeting. Baker was passing by on the sidewalk and was called over to the car, and the occupants commenced a conversation with him. They asked him if he was going to the meeting and if he would take them with him. According to their own version, he chatted with them for half an hour in casual conversation. Baker told them that he did not want to engage in conversation concerning the union. The Board's testimony disclosed that the whole conversation was initiated by the occupants of the car, and that Baker was merely answering their questions. It was in response to such questions that Baker said the factory could move out of town but it wouldn't be because of union activities. This incident is illustrative of the friendly and sociable relation which existed between Baker and the employees. Whether on the street or in the factory, he chatted and visited with the employees in a most friendly and informal fashion.

If, however, any unfavorable inference could be drawn from Baker's statements of December 27 standing alone, such inference was totally dispelled by an occurrence of December 10. On this occasion, Flamberg, respondent's president, who resided in New York City, and Leary met in conference with Ellinger, the International organizer, and with the officers of the International local. It is not claimed that International, at that time or any other, represented a majority of respondent's employees. In that conference, Flamberg told the officials of the International local that respondent would recognize and bargain with their union if it was selected by a majority of the employees, that he had no choice in the matter at all, and "that he was not fighting unions." According to the

Board's witnesses, Flamberg made it plain that no discrimination would be tolerated against any employees on account of union membership, and requested them to report to Leary anything which they might feel was a discrimination against any member of the union. At the request of International's organizer, Flamberg authorized the union to quote him as to respondent's position in this respect. As a result, circulars were published and distributed by International officials to all of respondent's employees. The statement advised the employees, among other things, as follows:

"Mr. Irving Flamberg, with permission to publish, declared he was willing to deal with the Union whenever a majority was reached and pledged that no worker would be discriminated against for union membership."

Thus, when the statements made by Baker are considered in connection with respondent's background, the unequivocal testimony of the persons to whom the statements were made that they knew such statements merely represented Baker's opinion and in further connection with respondent's attitude as expressed by Flamberg, made known to all of respondent's employees, there is not the slightest basis for a finding that such statements were coercive, or that they represented respondent's attitude. As was said in *National Labor Relations Board v. Virginia Electric & Power Co.*, 314 U. S. 469, 479:

"It is clear that the Board specifically found that those utterances were unfair labor practices, and it does not appear that the Board raised them to the stature of coercion by reliance on the surrounding circumstances. If the utterances are thus to be separated from their background, we find it difficult to sustain a finding of coercion with respect to them alone."

The Board's decision dwells at length upon an article published in the Wayne County Press of Fairfield, January 2, 1941, entitled "Combating Union at Campe Factory Here." After elaborating the details of this article, the statement appears in a footnote: "We do not find that

responsibility for the publication of this newspaper article referred to above is chargeable to respondent." It is plain that respondent had nothing to do with the publication of the article, and in fact repudiated it at the first opportunity. The question naturally arises as to why such admittedly incompetent evidence was offered, much less relied upon by the Board in its decision and in its brief in this Court.

The Better Union, an unaffiliated organization, was permitted to intervene before the Labor Board and also in this Court. In its brief, it is stated: "The primary purpose of the charges and the complaint was to destroy an independent union formed by a large majority of the workers, known as The Better Union." In my judgment, this assertion is justified by the record. There is not a scintilla of evidence that respondent in any way, shape or form assisted this Union, financially or otherwise. The circumstances relied upon by the Board are frivolous and so speculative as to carry little, if any, weight.

The Better Union had its inception at a Christmas party, held at the home of one of the employees on December 19, 1940. During such party, a discussion was had concerning the International. Most of those present were opposed, largely on account of the threats made by the International organizer. At any rate, one of those present, by the name of Anthis, was instructed to consult an attorney, which was done. The attorney prepared the constitution and by-laws and appeared at a meeting of those desiring to join The Better Union. The attorney explained their rights under the Act and that they were free to join either the International or The Better Union. The only asserted connection between the organization of The Better Union and respondent is furnished by the testimony of one Kittel, secretary of the International. According to his testimony, Anthis was frequently seen in Leary's office under friendly, and what Kittel thought were suspicious, circumstances. On his testimony, the Board found that "Anthis was accorded unusual freedom by the respondent during the period of time in which he was actively engaged in organizing T. B. U." There is no proof as to what was said either by Leary or Anthis, or that the visits had any-

thing to do with the organization of The Better Union. Upon the Board's finding of "unusual freedom", it jumps to the far-fetched conclusion that it had to do with the formation of The Better Union.

The Board in its brief states that certain employees, including "Perry Musgrave, foreman of respondent's cutting room, discussed ways and means of stopping the Union." This was supposed to have happened at the party on December 19 heretofore mentioned. It is true that Musgrave was present at this party, but I am unable to find a word of testimony that he participated in the discussion. The fact is that one of the Board's own witnesses testified that he was not in the room when such discussion took place.

Another circumstance relied upon is that some of the supervisory employees attended meetings of The Better Union. It should be noted that they also attended meetings of the International. The fact further is they were invited to attend the meetings of both Unions, and at both they heard speakers fairly advise those present of their rights, and that they must choose for themselves which Union they preferred. These supervisory employees took no part in the discussion at the meetings they attended, either of The Better Union or of the International. The Board concedes in its brief, as it must, that the supervisory employees had a right to attend the union meetings and to join if they desired, but it is claimed that their presence at the meetings of The Better Union had a prejudicial effect. How this speculative conjecture was reached is not disclosed. There is no dispute but that such supervisors had been warned to be neutral as between the two Unions, and there is no proof that they rendered any form of assistance to either. Moreover, what was respondent to do? If it had discharged such supervisory employees for attending or joining either of these Unions, it no doubt would have been charged with discrimination. Such was the predicament of the employer in *National Labor Relations Board v. Luxuray, Inc.*, 123 Fed. (2d) 106, 108.

On January 3, 1941, The Better Union, through its attorney, made formal demand to be recognized as the bargaining agent for respondent's employees. At that time, it had a membership of 180, out of a total of about 250

employees. At the hearing before the Trial Examiner, it was stipulated that 180 employees would testify, if called, that they were members of The Better Union.

Thus the record, to me, conclusively demonstrates that there was no domination or interference with the organization of The Better Union. It was the free and voluntary act of the employees themselves. It was the exercise of a right guaranteed by the Act. For the protection of this right, 180 of such employees knocked at the door of the Labor Board in vain. To hold, as has been done under the flimsy pretexts advanced, that they were intimidated or coerced, is to disparage their intelligence. It is such decisions as this which are calculated to bring the National Labor Relations Act into disrepute. As a final climax to this arbitrary decree, respondent, among other things, is directed to post notices immediately, "that the respondent's employees are free to become or remain members of International Ladies' Garment Workers' Union, Local No. 373, affiliated with the American Federation of Labor, and that the respondent will not discriminate against any employee because of membership or activity in that organization."

I think the Board's petition for enforcement should be Denied.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute involved	3
Statement	4
Argument	11
Conclusion	18
Appendix	19

CITATIONS

Cases:

Bussmann Mfg. Co. v. *N. L. R. B.*, 111 F. (2d) 783	11
Cudahy Packing Co. v. *N. L. R. B.*, 102 F. (2d) 745	16
Eagle-Picher Mining and Smelting Co. v. *N. L. R. B.*, 119 F. (2d) 903	14
Gamble-Robinson Co. v. *N. L. R. B.*, 129 F. (2d) 588	16
Greenport Basin and Construction Co. v. *N. L. R. B.*, decided Jan. 19, 1943, enforcing 42 N. L. R. B. 377	16
Heinz, H. J., Co. v. *N. L. R. B.*, 311 U. S. 514	12
International Association of Machinists v. *N. L. R. B.*, 311 U. S. 72	12, 15
Kansas City Power and Light Co. v. *N. L. R. B.*, 111 F. (2d) 340	11
Luxuray, Inc., Matter of, 16 N. L. R. B. 37	13
Marlin-Rockwell Corp. v. *N. L. R. B.*, decided Jan. 28, 1943, enforcing 39 N. L. R. B. 501	16
N. L. R. B. v. *Algoma Net Co.*, 124 F. (2d) 730, certiorari denied, 316 U. S. 706	18
N. L. R. B. v. *American Potash and Chemical Corp.*, 98 F. (2d) 488, certiorari denied, 306 U. S. 643	14
N. L. R. B. v. *American Rolling Mill Co.*, 126 F. (2d) 38	16
N. L. R. B. v. *Automotive Maintenance Machinery Co.*, 315 U. S. 282	17
N. L. R. B. v. *Baldwin Locomotive Works*, 128 F. (2d) 39	16
N. L. R. B. v. *Biles Coleman Lumber Co.*, 98 F. (2d) 18	14
N. L. R. B. v. *Botany Worsted Mills*, 106 F. (2d) 263	11
N. L. R. B. v. *Christian Board of Publication*, 113 F. (2d) 678	14
N. L. R. B. v. *Clarksburg Publishing Co.*, 120 F. (2d) 976	11
N. L. R. B. v. *Condenser Corp.*, 128 F. (2d) 67	14

513567—43——1

Cases—Continued. Page

N. L. R. B. v. *Delaware-New Jersey Ferry Co.*, 128 F. (2d) 130 14
N. L. R. B. v. *Electric Vacuum Cleaner Co.*, 315 U. S. 685 .. 17
N. L. R. B. v. *Entwistle Mfg. Co.*, 120 F. (2d) 532 11
N. L. R. B. v. *Express Publishing Co.*, 312 U. S. 426 17
N. L. R. B. v. *Link-Belt Co.*, 311 U. S. 584 ..... 12, 15
N. L. R. B. v. *Luxuray, Inc.*, 123 F. (2d) 106 13
N. L. R. B. v. *Nevada Consolidated Copper Corp.*, 316 U. S. 105 17
N. L. R. B. v. *New Era Die Co.*, 118 F. (2d) 500 11
N. L. R. B. v. *Ohio Fuel Gas Corp.*, decided December 17, 1942, enforcing 35 N. L. R. B. 1128 16
N. L. R. B. v. *Pacific Gas & Electric Co.*, 118 F. (2d) 780 .. 15
N. L. R. B. v. *Remington-Rand, Inc.*, 94 F. (2d) 862, certiorari denied, 304 U. S. 576 13
N. L. R. B. v. *Skinner & Kennedy Stationery Co.*, 113 F. (2d) 667 ..... 13, 14
N. L. R. B. v. *Star Publishing Co.*, 97 F. (2d) 465 14
N. L. R. B. v. *Swift & Co.*, 129 F. (2d) 222 16
N. L. R. B. v. *Yale & Towne Mfg. Co.*, 114 F. (2d) 376 ... 11
Owens-Illinois Glass Co. v. *N. L. R. B.*, 123 F. (2d) 670, certiorari denied, 316 U. S. 662 18
Westinghouse Electric & Mfg. Co. v. *N. L. R. B.*, 112 F. (2d) 657, affirmed per curiam 312 U. S. 660 16
Wilson & Co. v. *N. L. R. B.*, 126 F. (2d) 114, certiorari denied, 316 U. S. 699 18

Statute:

Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. 151 *et seq.*:
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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 702

AINTREE CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. A. 321–332)[1] is not yet reported. The findings of fact, conclusions of law, and order of the National Labor Relations Board (B. A. 341–371) are reported in 37 N. L. R. B. 1174.

[1] The record upon this petition consists of the appendix to the Board's brief in the court below, herein referred to as "B. A.," the appendix to the company's brief in the court below, herein referred to as "R. A.," and the record of the supplemental proceedings in the court below, bound into the company's appendix (R. A. 317–340).

JURISDICTION

The decree of the court below (R. A. 336–338) was entered on December 4, 1942. A petition for rehearing was denied on December 4, 1942 (R. A. 336). The petition for a writ of certiorari was filed on February 3, 1943. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether there is substantial evidence supporting the findings of the Board, which were sustained by the court below, that petitioner dominated, interfered with and supported a labor organization of its employees known as The Better Union, discriminatorily discharged Mina Hale, and in these and other respects interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.[2]

2. Whether, under the circumstances of this case, the Board abused its discretion in entering

[2] Petitioner urges the further question, which is not necessarily presented, since the Board's order is adequately supported even if it is answered in petitioner's favor: May the Board take into consideration in reaching its findings of domination, interference, and support the fact that petitioner's foremen and foreladies repeatedly attended meetings of The Better Union.

an order requiring petitioner to cease and desist from "in any other manner" interfering with its employees in the exercise of the rights guaranteed in Section 7 of the Act.

3. Whether, upon findings that petitioner discouraged membership in a specified labor organization, the Board abused its discretion in entering an order requiring petitioner to post notices stating that its employees are free to become or remain members of the specified organization and that it will not discriminate against employees because of membership or activity in that organization, without adding a statement that the employees are free to join any organization they choose.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act are set forth in the Appendix, *infra*, pp. 19–20.

STATEMENT

Upon the usual proceedings, the Board issued its findings of fact, conclusions of law, and order (B. A. 341–371). The facts, as found by the Board and as shown by the evidence, may be summarized as follows:[2]

[2] In the following statement the references preceding the semicolons are to the Board's findings, and the succeeding references are to the supporting evidence.

The International Ladies' Garment Workers' Union, Local 373, herein called the International, initiated efforts to organize petitioner's employees in September 1940 (B. A. 345; B. A. 16, 52–53). Baker, respondent's production manager, at once made known his opposition to such activities, informing Goldie Manlove, an employee, that union organizers were "only a bunch of racketeers" interested solely in "their dues each week," and that "they" had had the union organizer "up before the judge" on the night before and "threatened to run him out of town" (B. A. 346; B. A. 53–55). In October, shortly after employee Jewell Elliott joined the International, Production Manager Baker approached her as she was talking with several other employees before beginning work and stated that "we had better not catch you talking about it [the union]" (B. A. 347; B. A. 57–58).[4]

Temporary officers of the International were elected on November 7, 1940, and publicity was given to the results of this election in the union bulletin as well as in the Fairfield newspapers. Thereafter, Production Manager Baker approached Arline Potts, temporary recording secretary of the International, at her machine,

[4] Forelady Shehorn, also, openly expressed to Mrs. Elliott her disapproval of the International, telling her, "I think it is all hooey and ought to be stopped" (B. A. 347–348; B. A. 56–57).

handed her a copy of the union bulletin naming the union officers and, after criticizing the president of the International and casting aspersions upon unions generally, warned that "if the Company kept losing money they would be compelled to close on account of the Union" (B. A. 346–347; B. A. 17, 40–42, 50–51, 238). In December, Production Manager Baker had a conversation with a group of International members in which he repeated his earlier threat that the plant would be closed because of the activities of the International (B. A. 347; B. A. 43–44).

Following Baker's threats that petitioner would not operate its plant at Fairfield if the employees joined the International, employee Clem Anthis took steps looking toward keeping that organization out of the plant. Early in December he appealed to the City Council of Fairfield to ban such activities, but was unsuccessful in this venture (B. A. 355–356; B. A. 206–209, 224–227). Later that month, at a party of non-union employees at which ways and means of "stopping the Union" were discussed, Anthis was delegated to consult an attorney for advice on this point (B. A. 355–356; B. A. 61–62, 85, 88–89, 176–177, 185–186, 194, 197–198, 202, 205).

On December 26, after another fruitless appeal to the City Council, Anthis sought the aid of the Chamber of Commerce "to keep the [Inter-

national] out" (B. A. 356; B. A. 208–209, 216). The Chamber of Commerce declined to help him and suggested that he consult an attorney. Anthis immediately arranged to meet Robert S. Brown, a local attorney, the next day, and procured the City Hall for a meeting of employees on the next night (B. A. 356; B. A. 209, 218). Anthis notified his fellow employees as they went to work on the morning of December 27 of the meeting to be held that night at the City Hall (B. A. 356–357; B. A. 219–221). Securing permission from his foreman to leave his work that morning, Anthis sought advice of Attorney Brown as to what "they could do to stop the A. F. of L." Informed that the employees could form "a union of their own," Anthis commissioned Attorney Brown to prepare the constitution and bylaws of such an organization (B. A. 356–357; B. A. 103, 209–210, 213–214, 215–216).

At the meeting that night, over which Anthis presided,[5] the employees, after hearing a speech by Brown antagonistic to the International and

[5] During the month of December, Anthis was allowed unusual freedom of action in petitioner's plant, frequently leaving his work without the permission of his foreman (B. A. 357–359; B. A. 107–109, 111–112, 114, 117, 119–120, 122–125). The Board found that this demonstrated to the employees that petitioner approved of his activities, and that he was acting on behalf of petitioner in working for the formation of The Better Union (B. A. 363, 365).

favorable to the formation of a rival organization, adopted the constitution and bylaws of The Better Union, drafted by Attorney Brown (B. A. 357; 65–66, 78, 84, 89, 179–180, 193, 195–196). Foremen Musgrave and Humphrey and Foreladies Shehorn and Schumacher, petitioner's entire supervisory force with the exception of General Manager Leary and Production Manager Baker, were present throughout this meeting (B. A. 357; B. A. 63, 87, 89, 196). The foremen and foreladies continued to attend meetings of The Better Union at least through April 1941 (B. A. 359, 362; B. A. 90–91, 181, 236, 194, 244–246, 255, 272–273).

On January 2, 1941, a local newspaper published an article in which the formation of The Better Union was frankly attributed to the fear of the employees that petitioner would cease operations at Fairfield if the International succeeded in organizing the plant (B. A. 359–360; B. A. 329).[6] Although General Manager Leary read the article, he admittedly did nothing to refute its coercive implications, but merely sent a copy on to Flamberg, petitioner's president, in New York

[6] This article stated (B. A. 329):

"Knowing the history of the Aintree plant that they will not operate where unions are organized and observing obvious moves of the plant toward the closing of the factory here, the employees decided to meet and see what, if anything, could be done to stop the move of the union organizers—thus protecting their jobs."

City (B. A. 360; B. A. 273–275). Flamberg, after a few days, prepared a notice stating that petitioner was disinterested in the employees' choice of unions, but this notice was not brought to the employees' attention until it was posted on petitioner's bulletin board on January 13, 1941, at least 2 weeks after The Better Union had secured the adherence of a majority of the employees (B. A. 360–361, 366; B. A. 320–322, R. A. 231–236). About this time President Flamberg came to Fairfield and instructed petitioner's foremen and foreladies not to interfere in union matters and posted a further notice requiring all of its employees, including foremen, under penalty of immediate dismissal, to cease making statements which could be interpreted as reflecting the position of the company (B. A. 361–362; B. A. 187, 248–249, 322–323).

The Board found that these protestations of neutrality and similar assurances earlier given representatives of the International[7] "were not effective in giving assurance to the employees that [petitioner] was in fact impartial" for the reason that they were too long delayed and for the further reason that petitioner's supervisory officials thereafter did not adhere to the neutral position proclaimed by President Flam-

[7] These assurances were given on December 10, 1940, when representatives of the International conferred with President Flamberg concerning the discharge of Mina Hale (B. A. 351, 352, 355, 367; B. A. 115–116, see *infra*, pp. 9–10).

berg (B. A. 363, 367). The Board therefore concluded that petitioner had prevented the employees from exercising "that freedom of self-organization guaranteed under the Act," thereby engaging in unfair labor practices within the meaning of Section 8 (2) and (1) of the Act (B. A. 367).

Early in December 1940, upon Production Manager Baker's recommendation, petitioner discharged Mina Hale, the mother of Mrs. Shaw, the president of the International (B. A. 350–351; B. A. 24, 127, 138–139), whom Baker had previously criticized (*supra*, pp. 4–5). Mrs. Hale, employed by petitioner since 1932, had joined the International in October, had regularly attended its meetings, and had been open in her advocacy of the organization (B. A. 348, 350; B. A. 126, 127, 156, 137–138). The only explanation offered by petitioner was that Mrs. Hale had been "laid off" because she allegedly had an excessive amount of "make up" (B. A. 351–352; B. A. 139, 140–141, 253, 301).[8] This explanation is demonstrably false according to petitioner's own production records, which show that, instead of having the next to

[8] Petitioner's production employees, although generally paid on a piece-rate basis, must be paid the minimum wages required by the Fair Labor Standards Act (B. A. 349; B. A. 129, 232, 257–258). When an employee on a piece-rate basis fails to earn the minimum wage at the rate provided, the difference, or "short" amount, is "make-up" paid by petitioner (B. A. 35, 257–258).

the highest amount of "make-up," as claimed by petitioner, Mrs. Hale in fact had next to the lowest amount of "make-up" of the five employees upon her operation (B. A. 352; B. A. 324–328). Mrs. Hale was never reinstated although petitioner subsequently required the services of operators doing work she had formerly done (B. A. 352–353; B. A. 323–324, 161, 165). The Board found that petitioner had not merely laid off Mrs. Hale, but had discharged her in order to discourage membership in the International, thereby engaging in an unfair labor practice within the meaning of Section 8 (3) and (1) of the Act (B. A. 355).

The Board's order directed petitioner to cease and desist from discouraging membership in the International, dominating, interfering with, and supporting The Better Union, and in any other manner interfering with the rights guaranteed in Section 7 of the Act; to reinstate Hale with back pay; to withhold recognition from The Better Union; and to post the usual notices (B. A. 369–371).

Thereafter, the Board filed in the court below a petition for enforcement of its order. On November 12, 1942, the court handed down its opinion (R. A. 321–333), and on December 4, 1942, entered its decree (R. A. 336–338), enforcing the Board's order in full.

ARGUMENT

1. While questioning the substantiality of the evidence supporting the Board's findings generally, petitioner primarily[9] objects to the Board's findings concerning the attendance of its foremen and foreladies at meetings of The Better Union, contending that the Board erroneously gave weight to these findings in reaching its conclusions (Pet. 2, 3, 17, 19, 23–25). Even if this were correct, the Board's order is adequately supported by the findings as to the activities of Production Manager Baker, Forelady Shehorn, and Anthis, set forth in the statement, *supra,* pp. 4–8. The abstract question as to the rights of foremen to attend union meetings of their subordinates without causing their employer to violate the Act is thus not before the Court.

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[9] Petitioner also challenges the sufficiency of the evidence as to the reason for the discharge of Mrs. Hale. That the Board's order in this respect was valid is shown by the facts set forth in the Statement, *supra* (pp. 9–10). The circuit courts of appeals have uniformly regarded the fact that an employer advances a specious explanation for a discharge or lay-off as a significant factor on the issue of anti-union discrimination. *Bussmann Mfg. Co.* v. *N. L. R. B.*, 111 F. (2d) 783, 786 (C. C. A. 8); *N. L. R. B.* v. *Clarksburg Publishing Co.*, 120 F. (2d) 976, 982 (C. C. A. 4); *N. L. R. B.* v. *Botany Worsted Mills*, 106 F. (2d) 263, 268 (C. C. A. 3); *N. L. R. B.* v. *Entwistle Mfg. Co.*, 120 F. (2d) 532, 536 (C. C. A. 4); *Kansas City Power and Light Co.* v. *N. L. R. B.*, 111 F. (2d) 340, 354–355 (C. C. A. 8); *N. L. R. B.* v. *New Era Die Co.*, 118 F. (2d) 500, 506 (C. C. A. 3); *N. L. R. B.* v. *Yale & Towne Mfg. Co.*, 114 F. (2d) 376, 378 (C. C. A. 2).

Moreover, in view of this background, it certainly was not improper for the Board to consider the coercive effects of the continued attendance of petitioner's foremen and foreladies at meetings of The Better Union in reaching its conclusions. The foremen and foreladies were the principal point of contact between the employees and the management (B. A. 364; B. A. 38). Foreman Musgrave was in charge of the cutting room in which 7 or 8 employees worked (B. A. 19–21); Foreman Humphrey directed the work of approximately 18 employees in the pressing and box department (B. A. 26); and Foreladies Shehorn and Schumacher had charge of between 150 and 175 employees in the stitching department (B. A. 23–25, 235–236, 276). The foremen and foreladies possessed and frequently exercised the power to recommend employees for hiring and discharge (B. A. 365; B. A. 20–22, 23–28, 31–32, 235–236). Thus, the employees had "just cause to believe" that the foremen and foreladies "were acting for and on behalf of the management," and the Board was justified in weighing their action in attending meetings of The Better Union in determining whether the employees had "the complete and unhampered freedom of choice which the Act contemplates." *International Association of Machinists* v. *N. L. R. B.*, 311 U. S. 72, 80; *H. J. Heinz Co.* v. *N. L. R. B.*, 311 U. S. 514, 520; *N. L. R. B.* v. *Link-Belt Co.*, 311 U. S. 584, 599.

The attendance of the foremen and foreladies at meetings of The Better Union obviously indicated to their subordinates the preference of the management for The Better Union, since the supervisors were management officials exercing managerial functions. Any possible ambiguity in their conduct was dispelled by the contrast between the reception which the management accorded the respective organizing drives of the International and The Better Union.

There is no conflict between the decision of the court below and the decision of the Eighth Circuit in *N. L. R. B.* v. *Skinner & Kennedy Stationery Co.*, 113 F. (2d) 667, as petitioner urges (Pet. 17, 24).[10] The latter case merely holds that under the circumstances there presented a supervisory employee was an employee within the meaning of Section 2 (3) of the Act, and therefore was entitled to the protection which the Act affords employees against discharges because of union activities.[11] But the fact that an em-

[10] *N. L. R. B.* v. *Luxuray, Inc.*, 123 F. (2d) 106 (C. C. A. 2), which petitioner also asserts is in conflict with the decision of the court below (Petition, pp. 17, 25), is totally inapposite. The *Luxuray* case does not involve a supervisory employee but merely an ordinary production employee who, for a few months before she joined the union, had temporarily acted as forelady. See *Matter of Luxuray, Inc.*, 16 N. L. R. B. 37, 42–43.

[11] The *Skinner & Kennedy* case is similar to numerous other cases in which supervisory employees were coerced in exercising their rights of self-organization. Cf. *N. L. R. B.* v. *Remington-Rand, Inc.*, 94 F. (2d) 862, 870 (C. C. A. 2), certi-

ployer may not discriminate against supervisory employees who exercise their own rights of self-organization in a way not shown to coerce their subordinates has no bearing upon the issue whether coercion has, in a wholly different case, been visited by supervisors upon their subordinates. This is suggested in the *Skinner & Kennedy* opinion itself (113 F. (2d), at 671). And in *N. L. R. B.* v. *Christian Board of Publication,* 113 F. (2d) 678, 682, decided the same day as the *Skinner & Kennedy* decision, the Eighth Circuit held the employer responsible for the activities of its supervisory employees in support of an "Employees Committee" despite the employer's claim that the supervisory employees were eligible to membership in the "Employees Committee" and therefore "were entitled actively to participate in the promotion of the Employees Committee." This decision rejecting the precise contention made by petitioner in this case completely eliminates any question of a conflict between the

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orari denied, 304 U. S. 576; *N. L. R. B.* v. *Star Publishing Co.*, 97 F. (2d) 465, 467 (C. C. A. 9); *N. L. R. B.* v. *Biles Coleman Lumber Co.*, 98 F. (2d) 18, 23 (C. C. A. 9); *N. L. R. B.* v. *American Potash and Chemical Corp.*, 98 F. (2d) 488, 493–494 (C. C. A. 9), certiorari denied, 306 U. S. 643; *Eagle-Picher Mining and Smelting Co.* v. *N. L. R. B.*, 119 F. (2d) 903, 911–913 (C. C. A. 8); *N. L. R. B.* v. *Condenser Corp.*, 128 F. (2d) 67, 74–75 (C. C. A. 3); *N. L. R. B.* v. *Delaware-New Jersey Ferry Co.*, 128 F. (2d) 130, 132–133 (C. C. A. 3) (domination and interference with Captains and Deck Hands Committee).

holdings of the Eighth Circuit and the court below on this point. Cf. *International Association of Machinists* v. *N. L. R. B.*, 311 U. S. 72, 81; and *N. L. R. B.* v. *Pacific Gas & Electric Co.*, 118 F. (2d) 780, 788 (C. C. A. 9).

2. Petitioner contends (Pet. 3, 17–18, 23, 25–27) that the Board erred in failing to require petitioner to include in the notice to be posted under paragraph 2 (d) of the order (B. A. 371), in addition to the statement that its employees are free to become or remain members of the International and that it will not discriminate against any employee because of membership or activity in that organization, the further statement that the employees are free to join any union they choose. This contention is without merit. Petitioner's discriminatory conduct put the employees upon notice that they were not free to join a particular labor organization, the International. In this situation it clearly was not an abuse of the Board's discretionary power to determine "how the effect of prior unfair practices may be expunged" [12] to direct petitioner to notify its employees without more that they are now free to join and remain members of the particular organization which was the target of petitioner's unfair labor

[12] *International Association of Machinists* v. *N. L. R. B.*, 311 U. S. 72, 82; *N. L. R. B.* v. *Link-Belt Co.*, 311 U. S. 584, 600.

practices. While several of the circuits courts of appeals [13] have in particular factual situations required the inclusion in the Board's notices of an additional clause of the kind requested by petitioner, these courts have, in subsequent decisions, enforced provisions identical with the ones here in controversy.[14] This indicates that these courts have adopted no hard and fast rule, but vary their decision according to the facts presented and even if regarded as conflicting, the numerous minor changes made by the courts in the wording of the notices required to be posted would not raise issues of sufficient importance to warrant the granting of writs of certiorari.

3. Petitioner urges (Pet. 2–3, 18, 23, 27–30) that the provision of the order which restrains

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[13] *Westinghouse Electric & Mfg. Co.* v. *N. L. R. B.*, 112 F. (2d) 657, 661 (C. C. A. 2), affirmed per curiam 312 U. S. 660; *N. L. R. B.* v. *Baldwin Locomotive Works*, 128 F. (2d) 39, 51 (C. C. A. 3); *N. L. R. B.* v. *American Rolling Mill Co.*, 126 F. (2d) 38, 42 (C. C. A. 6); *Cudahy Packing Co.* v. *N. L. R. B.*, 102 F. (2d) 745, 753 (C. C. A. 8).

[14] See, for example, *Greenport Basin and Construction Co.* v. *N. L. R. B.*, decided January 19, 1943 (C. C. A. 2), 11 L. R. R. 717, enforcing 42 N. L. R. B. 377, 403; *Marlin-Rockwell Corp.* v. *N. L. R. B.*, decided January 28, 1943 (C. C. A. 2), 11 L. R. R. 762, enforcing 39 N. L. R. B. 501, 529; *N. L. R. B.* v. *Ohio Fuel Gas Co.*, decided December 17, 1942 (C. C. A. 6), 11 L. R. R. 717, enforcing 35 N. L. R. B. 1128, 1144; *N. L. R. B.* v. *Swift & Co.*, 129 F. (2d) 222 (C. C. A. 8), enforcing 30 N. L. R. B. 550, 583; *Gamble-Robinson Co.* v. *N. L. R. B.*, 129 F. (2d) 588 (C. C. A. 8), enforcing 33 N. L. R. B. 351, 367.

petitioner from in any manner interfering with its employees in the exercise of the rights guaranteed in Section 7 of the Act is invalid under the principles enunciated in *N. L. R. B.* v. *Express Publishing Co.*, 312 U. S. 426. But in the *Express* case, this Court recognized that the "breadth of the order * * * must depend upon the circumstances of each case" (312 U. S., at 436). In that case the sole unfair labor practice was an isolated refusal to bargain. In this case petitioner engaged in numerous practices, including interrogation of employees as to union matters, disparagement of unions and union organizers, veiled threats of discharge, and threats that the plant would be closed because of union activities, which came squarely within the prohibition of Section 8 (1) of the Act. This circumstance in and of itself suffices to support the Board's order. Moreover, this case involves violations of Section 8 (2) and (3) of the Act and thus furnishes ample basis for the belief that other violations might occur unless restrained—a second sufficient ground for the broad type of order. Provisions like the one here in controversy were enforced in *N. L. R. B.* v. *Automotive Maintenance Machinery Co.*, 315 U. S. 282; *N. L. R. B.* v. *Electric Vacuum Cleaner Co.*, 315 U. S. 685; and *N. L. R. B.* v. *Nevada Consolidated Copper Corp.*, 316 U. S. 105. Contentions similar to that raised by petitioner were made by the employers and rejected

in *Owens-Illinois Glass Co.* v. *N. L. R. B.*, 123 F. (2d) 670 (C. C. A. 6), certiorari denied, 316 U. S. 662; *Wilson & Co.* v. *N. L. R. B.*, 126 F. (2d) 114 (C. C. A. 7), certiorari denied, 316 U. S. 699; *N. L. R. B.* v. *Algoma Net Co.*, 124 F. (2d) 730 (C. C. A. 7), certiorari denied, 316 U. S. 706.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MARCH 1943.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. 151 *et seq.*) are as follows:

SEC. 8. It shall be an unfair labor practice for an employer —

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * * *

SEC. 10. * * *

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an

order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

U. S. GOVERNMENT PRINTING OFFICE: 1943

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1942.

AINTREE CORPORATION,
a Corporation,
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD,
Respondent.
No. 702.

PETITIONER'S REPLY BRIEF.

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INDEX.

Page

I. A reply to point 1 (pages 11-15) of the argument in the brief of the National Labor Relations Board 1–6

II. A reply to point 2 (pages 15-16) of the argument in the Board brief 6–7

Cases Cited.

International Association of Machinists v. National Labor Relations Board, 311 U. S. 72..... 3, 4

National Labor Relations Board v. Christian Board of Publication, 113 F. (2d) 678, 680, 681..... 3

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PETITIONER'S REPLY BRIEF.

I.

A Reply to Point 1 (Pages 11-15) of the Argument in the Brief of the National Labor Relations Board.

In its brief filed in this court the board vigorously attempts to minimize the scope and effect of its own decision.

The Board found that the mere attendance of supervisory employees, of their own volition, at union meetings constitutes "activity" by such employees on behalf of

their employer, and that it was the petitioner's duty, under the Act, to restrain and prevent such attendance. While apparently recognizing the importance and gravity of such policy-making decision, the Board, in opposing a review thereof by this Court, suggests that such decision is not the sole foundation and basis of that portion of the Board's order which finds that petitioner "dominated and interfered with the formation and administration of (The Better Union) and contributed support thereto."

We will presently show that such finding concerning The Better Union is fundamentally dependent and based upon the Board's said conclusion with respect to the petitioner's failure to "**restrain**" its supervisory employees from attending meetings of The Better Union. Irrespective of this consideration, however, the fact remains that there is now outstanding a final decision of the Court below, to the effect that an employer is guilty of an unfair labor practice if he fails to restrain his supervisory employees from attending meetings of the union of their choice, notwithstanding the fact that such attendance constitutes their sole union "activity" (B. A. 363, 366; Appellate Proceedings 324-326).

Obviously, the gravity of this decision of the Court below, and the uncertainties created thereby as to the right of supervisory employees to freely attend meetings of a union of their own choice, and the liabilities of the employer resulting from the exercise by them of such rights, alone and independent of every other consideration, present a question of general importance which should be decided by this Court.

Moreover, if the Board's order, as sustained by the Court below, is permitted to stand, petitioner might be charged with contempt if it should fail to take all effective means, including discharge, if necessary, in order to "restrain" and prevent its supervisory employees from attending

union meetings or joining a union. On the other hand, if petitioner should take "effective means" to prohibit such attendance (thereby interfering with the rights of such employees, under the Act) the petitioner might likewise be charged with being in contempt of the decree.

This case is in a category entirely different from that of cases relied on by the Board.* In the instant case, the sole "activity" of the supervisory employees was the mere attendance by them of their own volition, at meetings of the union of their choice. There is no finding that they ever engaged in any union activity on the employer's time or property, or that they at any time, or at any place, solicited members for The Better Union. If mere attendance at union meetings, by foreman and foreladies, can render the employer guilty of dominating and interfering with such union and contributing support thereto, and if the employer must therefore prevent such attendance, as the Board and the Court below have held, it follows that a supervisory employee has none of the rights guaranteed by the Act.

If a permissible inference and finding of coercion and interference may be made from the fact that the petitioner did not "restrain" or check its foremen and foreladies from attending meetings of a union of their choice, then there is no manner in which such supervisory employees may exercise their theoretical rights under the Act, without liability on the part of their employer. There is no evidence here that the supervisory employees were acting on behalf of the petitioner. The inference that they were so acting is drawn by the Board solely from their super-

*In International Association of Machinists v. National Labor Relations Board, 311 U. S. 72, here cited by the Board, this Court said (l. c. 77): "This active solicitation (by supervisory employees) * * * was on Company time and was made openly in the shop." (Emphasis ours).

In National Labor Relations Board v. Christian Board of Publication, 113 F. (2d) 678, 680, 681, the Eighth Circuit Court of Appeals pointed out that "with the aid of foremen and other supervisory employees" petitions were circulated "during working hours."

visory capacity. Since this inference, if proper, could be drawn in any case with respect to supervisory employees, then the decision necessarily means that the mere attendance by foremen and foreladies, at meetings of a union of their choice, constitutes coercion and interference by the employer.

True it is, that membership or eligibility to membership in a union does "not require the Board to disregard * * * circumstances" which indicate that in opposing a union, supervisory employees "WERE EMULATING THE EXAMPLE SET BY THE MANAGEMENT" with respect to hostility to such union. International Association of Machinists v. N. L. R. B., 311 U. S. 72, 81. But we know of no case in which a Court has held, as in this case, that the mere attendance by supervisory employees at meetings of the union of their choice, constitutes domination of and interference with such union by the employer. Further, as is stated in the dissenting opinion of Circuit Judge Major herein:

> "* * * The unfavorable background, so heavily stressed by the Supreme Court in cases such as INTERNATIONAL ASSOCIATION OF MACHINISTS, TOOL AND DIE MAKERS V. NATIONAL LABOR RELATIONS BOARD, 311 U. S. 72, AND INTERNATIONAL LABOR RELATIONS BOARD V. LINK-BELT COMPANY, 311 U. S. 584, places the instant case in a different category. This background, how-however, has been completely ignored by the Board. There is not a scintilla of evidence of any anti-union history—that respondent has ever fostered company union, broken strikes, been guilty of espionage or of any character of hostility against or favoritism toward any union or member thereof * * *" (Appellate Proceedings 327).

We have heretofore stated that in the respects hereinabove mentioned, the Board's order is fundamentally

dependent upon the Board's conclusion as to the petitioner's failure to "restrain" its foremen and foreladies from attending meetings of The Better Union.

There is no evidence or finding that former supervisory employee Baker ever took any part in the formation, administration or activities of The Better Union; or that he ever, directly or indirectly, solicited members for that organization, or attended any of its meetings. A most casual reading of the Board's decision with respect to The Better Union, demonstrates that the Board's finding that petitioner dominated and interfered with the formation and administration of such union, is based upon the supervisory employees' attendance at meetings of The Better Union.

Following its finding that "* * * all the (petitioner's) supervisors of foremen rank continued unchecked to attend T. B. U. meetings and continued thereby to throw the (petitioner's) support to that organization", the Board found that "IN ADDITION, the freedom of action which the (petitioner) accorded (employee) Anthis demonstrated to the (petitioner's) employees that Anthis was acting as an agent for the petitioner and that it approved of his activities" (B. A. 363; emphasis ours). Thus, the Board's finding is fundamentally based on the supervisory employees' "unchecked" attendance at meetings of The Better Union. The "freedom of action" allegedly accorded Anthis was obviously viewed by the Board itself, as only a factor which, when considered "in addition" to the supervisory employees' said attendance, "demonstrated" to the petitioner's employees that the petitioner favored The Better Union.

The evidence respecting the alleged "freedom of action" of Anthis, is summarized on Page 12 of the Petition filed by petitioner in this Court. If, as the Board now suggests, the Court may disregard the findings respecting the supervisory employees' attendance at meetings of The Better

Union, the only remaining alleged evidence of the petitioner's "domination" of and "interference" with The Better Union, would be the evidence concerning the alleged "freedom of action" of Anthis. We respectfully submit that such evidence is no more than mere conjecture or speculation and falls far short of justifying any inference that petitioner "dominated and interfered with the formation and administration of (The Better Union)" and contributed support thereto.

II.

A Reply to Point 2 (Pages 15-16) of the Argument in the Board Brief.

In footnote 14, on page 16 of its brief, the Board has cited several Circuit Court decisions which the Board claims have held proper the requirement that an employer post notices similar to that directed in paragraph 2 (d) of the order (B. A. 371).

In not a single one of the opinions so cited by the Board is there any language or statement which even remotely indicates that this issue was either raised by the parties or considered by the Court.

There is absolutely nothing in any of said opinions which in any way considers or decides the propriety of requiring an employer to post a notice which, while stating that employees are free to join or remain members of a specifically named organization, fails to further state and inform the employees that they are free to join or organize any union they choose without being limited to the **sole** organization designated in such notice. Hence, said opinions in no way remove the conflict in the respect mentioned between the decision of the Court below and the decisions of the Second, Third, Sixth and Eighth Circuit Courts of

Appeals cited by the petitioner in number II of its "**REASONS RELIED ON FOR ALLOWANCE OF WRIT**" (Pages 17-18 of Petition for Certiorari; Pages 25-27 of Petitioner's Supporting Brief).

In those cases, so relied on by the Petitioner, the said Circuit Courts did not (as is here suggested by the Board) regard the changes which they required to be made in the notices as "minor." On the contrary, they considered such changes as involving matters of substance, and required by good faith in the effectuation of the intent and spirit of the Act.

Such conflict between the decision of the Court below and the decisions of said other Circuit Courts of Appeals (which conflict the Board itself recognizes on page 16 of its Brief) involves vital rights of employees under the Act, which should be settled by this Court.

Respectfully submitted,

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Petitioner.